IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A. O. NO. 1076 OF 2002

Shri Ansari Mohamed Zaki . ... Appellant
VS.
The Municipal Corporation of Gr. Bombay. ... Respondent

Mr. V. M. Thorat for appellant.
Ms. Geeta Joglekar for BMC.

CORAM: D. G. KARNIK **J.**

DATE: 13th October 2006

P.C.:

1. Heard learned counsel for the parties.

2. This appeal is filed by the appellant / plaintiff challenging the order dated 17th August 2002 passed by the City Civil Court, Mumbai, dismissing Notices of Motion bearing numbers 173 of 1998 and 2591 of 2001.

3. The plaintiff is a tenant of the structure bearing No. 15-A, Bhola Sheth Ki Chawl, 210, M.A. Cross Lane, Madanpura, Mumbai 8. On 17th October 1997 the respondent Municipal Corporation issued a notice under section 351 of the Bombay Municipal Corporation Act 1888, (for short “the Act”) to the

appellant/ plaintiff. In the said notice it was alleged that the appellant had carried out “unauthorized reconstruction of mezzanine floor with RSJ angles, ladi, coba and raising the height of the structure as shown in the overleaf”. The notice therefore called upon the appellant to show that the said work was authorized and show cause why the said structure should not be removed by pulling down. By his reply dated 29th October 1997, sent through his advocate, the appellant showed cause. He contended that he had purchased the running business of the previous tenant under a registered deed of assignment dated 26th August 1992 and was carrying on business in the suit premises as a tenant. He denied that he had unauthorizedly erected the mezzanine floor and stated that the mezzanine floor was in existence since before his taking of assignment of tenancy rights. He stated that even previously the Municipal Corporation had issued notice under section 354 A which was replied and no action was taken by the respondent. He stated that he had only carried out tenantable repairs to the mezzanine floor. He attached copies of the documents to his reply. By a short order dated 7th January 1998 the respondent rejected the appellant's contention that he had not carried out the unauthorized work and held that the appellant had not proved the authenticity of the work and therefore ordered demolition of the mezzanine floor.

4. Aggrieved appellant filed a suit bearing No. MC 158 of 1997 in the City Civil Court for a declaration that the notice dated 17th October 1997 issued to him under section 351 of the Act was illegal, invalid and also for a declaration that the order dated 7th January 1998 passed by the respondent no.1, rejecting the appellant's reply and order of demolition was illegal and void. In the suit the appellant took out two motions. By the first motion, bearing No. NM No. 173/1998, the appellant prayed for an injunction restraining the respondent from enforcing the notice dated 17th October 1997 and order dated 7th January 1998. The other motion, bearing N. M. No. 2591 of 2001 was relating to the wall on the back side. By a common order dated 17th August 2002 the City Civil Court dismissed both the motions. That order is impugned in this appeal.

5. At the outset the learned counsel for the appellant submitted that the appellant is not pressing in this appeal the order regarding dismissal of Motion No. 2591 of 2001. He restricted his argument to the rejection of Motion No. 173 of 1998 by which the appellant' s prayer for injunction restraining demolition of the mezzanine floor was dismissed.

6. Learned counsel for the appellant invited my attention to the circular dated 25th September 1997 issued by the respondent under which it has been stated that the Corporation had sent

a proposal to the Government in respect of regularization of the mezzanine floors and lofts and the proposal was pending with the Government. Since the Corporation had received many complaints that the ward officers were harassing for removal of mezzanine floors in spite of the decision of the Corporation which was declared in the newspapers, the Corporation directed all the ward officers not to take any action against any mezzanine floors and lofts constructed on or before 15th August 1997. The effect of this circular has been considered by this court in several decisions. One such decision has been cited before me. In A. O. No. 1459 of 1997 decided on 23rd December 1997 (Coram: F.I. Rebello J), this court has observed that it has taken a consistent stand that mezzanine floors erected before 1st July 1997 should not be demolished. The court held that this has been done with a view that officers of the Corporation should not act differently with the citizens. The court held as follows:

> "Until such time it would not be proper to demolish the mezzanine structure existing before 1st July 1997. In view of this the trial courts to note the fact that wherever the Corporation describes the structure as the mezzanine structure as a matter of course ad interim relief should be granted till Corporation withdraws the circular or its proposal to the State Government".

7. Counsel for the appellant states that this decision holds the field till today. In view of the clear decision of this court it must be held that the respondent cannot demolish the mezzanine floor, whether authorized or not but in existence prior to 15th August 1997. It therefore needs to be considered whether the suit mezzanine floor was in existence before 14th August 1997.

8. The notice under section 351 of the Act was issued by the Corporation on 17th October 1997. This indicates that the mezzanine floor was in existence since prior to 17th October 1997. The notice was issued on the basis of the visit of the ward officers of the Corporation. Copy of the report of the officers of the Corporation was not produced before the trial court. Yesterday, time was sought to produce the copy of the report before me but till today the copy of the report has not been produced. There is therefore no evidence on record to show what was the nature of the reconstruction which was allegedly made by the appellant. On the other hand the appellant has stated on affidavit that he had only repaired the structure of the mezzanine floor. The existence of the mezzanine floor is proved and even admitted by the respondent by issuance of notice under section 351 and earlier notice under section 354 of the Act and it cannot at this stage, be held that the mezzanine floor was constructed after 14th August 1997. On the other hand it prima facie

appears that the mezzanine floor was in existence prior to 14th August 1997. In any event the appellant had made out a strong prima facie case of the existence of the mezzanine structure prior to 14th August 1997. The matter is therefore covered by the decision of this court in A. O. No. 1459 of 1997 decided on 23rd December 1997.

9. For these reasons the appeal is allowed. The respondent is restrained from demolishing the mezzanine floor in pursuance of notice dated 17th October 1997 and order dated 7th January 1998 till disposal of the suit.

(D.G. KARNIK J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil application No. 1180 of 2002
in

A. O. NO. 1076 OF 2002

Shri Ansari Mohamed Zaki . ... Appellant
VS.
The Municipal Corporation of Gr. Bombay. ... Respondent

Mr. V. M. Thorat for appellant.
Ms. Geeta Joglekar for BMC.

CORAM: D. G. KARNIK **J.**

DATE: 13th October 2006

P.C.:

In view of the disposal of the appeal this civil application does not survive and is disposed of.

(D.G. KARNIK J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil application No. 227 of 2002
in

A. O. NO. 1076 OF 2002

Shri Ansari Mohamed Zaki . ... Appellant
VS.
The Municipal Corporation of Gr. Bombay. ... Respondent

Mr. V. M. Thorat for appellant.
Ms. Geeta Joglekar for BMC.

CORAM: D. G. KARNIK **J.**

DATE: 13th October 2006

P.C.:

In view of the disposal of the appeal this civil application does not survive and is disposed of.

(D.G. KARNIK J.)